

## Message Text

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ACTION EUR-12

INFO OCT-01 ISO-00 CIAE-00 DODE-00 PM-05 H-01 INR-10  
L-03 NSAE-00 NSC-05 PA-01 SP-02 SS-15 ICA-11  
IO-13 ACDA-12 EB-08 TRSE-00 OMB-01 /100 W  
-----111239 200843Z /10

P R 200749Z JUL 78  
FM USMISSION USBERLIN  
TO AMEMBASSY BONN PRIORITY  
INFO SECSTATE WASHDC 7311  
AMEMBASSY BERLIN  
AMEMBASSY BRUSSELS  
AMEMBASSY LONDON  
AMEMBASSY MOSCOW  
AMEMBASSY PARIS  
USMISSION USNATO

C O N F I D E N T I A L SECTION 1 OF 2 USBERLIN 1717

USEEC

E.O. 11652: GDS  
TAGS: PGOV, EC, AKB  
SUBJECT: EXTENSION OF FRG EUROPAAHNLGESETZ TO BERLIN

REF: USBER 1159

SUMMARY: BERLIN LEGAL ADVISERS, AT REQUEST OF LONDON, HAVE  
REVIEWED DRAFT BK/O TO BE ISSUED IN CONNECTION WITH EXTENSION  
OF EUROPAAHNLGESETZ TO BERLIN. A REVISED TEXT HAS BEEN PRE-  
PARED, BUT IT DOES NOT YET HAVE FULL AGREEMENT OF BERLIN MISSIONS  
AND BERLIN SENAT HAS NOT YET BEEN ADVISED OF NEW TEXT.  
CONSULTATIONS IN BERLIN ARE CONTINUING ON URGENT BASIS SO  
THAT EUROPAAHNLGESETZ CAN BE ADOPTED IN BERLIN AND APPROPRIATE  
BK/O CAN BE ISSUED AS SOON AS POSSIBLE. END SUMMARY.

1. REFTTEL REPORTED DRAFT BK/O WHICH BERLIN MISSIONS AGREED TO  
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IN CONNECTION WITH EXTENSION OF EUROPAAHNLGESTZ TO  
BERLIN. IN ESSENCE, THAT DRAFT RESTRICTED ITSELF TO STATE-  
MENT THAT PROVISIONS OF EUROPAAHNLGESETZ WHICH GIVE COM-  
PETENCE TO THE BUNDESVERFASSUNGSGERICHT (FRG FEDERAL  
CONSTITUTIONAL COURT) ARE NOT APPLICABLE IN BERLIN OR WITH  
RESPECT TO BERLIN REPRESENTATIVES TO THE EUROPEAN PARLIA-  
MENT (EP).

2. RECENTLY, US AND FRENCH LEGAL ADVISERS IN BERLIN WERE ADVISED BY BRITISH LEGAL ADVISER THAT LONDON BELIEVED THAT DRAFT BK/O RECOMMENDED BY BERLIN MISSIONS WOULD PERMIT THE SELECTION OF BERLIN REPRESENTATIVES TO THE EP TO BE SUBJECT TO CONTROL OF FEDERAL ORGANS. IN PARTICULAR, LONDON WAS CONCERNED WITH THE AUTHORIZATION IN THE EUROPAAHLGESETZ (ARTICLES 22, 23 AND 26) TO THE BUNDESTAG TO REVIEW THE ELIGIBILITY OF A PERSON TO BE ELECTED AND HIS SUITABILITY TO REMAIN IN OFFICE AS EP APRLIAMENTARIAN.

3. LEGAL ADVISERS EXAMINED IN SOME DETAIL BOTH EUROPAAHLGESETZ AND THE GENERAL FEDERAL ELECTION LAW (WAHLPRUEFUNGSGESETZ) TO DETERMINE WHETHER THE BUNDESTAG WOULD IN FACT BE AUTHORIZED BY THESE PROVISIONS TO MAKE A DECISION WITH RESPECT TO A BERLIN REPRESENTATIVE. OUR FINDINGS WERE AS FOLLOWS:

A. IN GENERAL, THE CRITERIA FOR LOSS OF OFFICE ARE OBJECTIVE CRITERIA (EG. CONVICTION OF A CRIME, ASSUMPTION OF ANOTHER OFFICE INCOMPATIBLE WITH CONTINUATION IN OFFICE AS A EUROPEAN PARLIAMENTARIAN, ETC.)

B. THOSE CRITERIA WHICH WERE LESS OBJECTIVE AND WHICH WOULD TEND TO LEAD TO A CONTROVERSY REQUIRING A CONFIDENTIAL

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THIRD PARTY DECISION RELATED TO THE PUBLIC ELECTION PROCESS (EG. CONTESTING ELECTION RETURNS, INELIGIBILITY FOR ELECTION, ETC), AND BY DEFINITION THESE SCRUTINY PROVISIONS WOULD BE INAPPLICABLE TO BERLIN REPRESENTATIVES SINCE BERLIN REPRESENTATIVES WOULD BE SELECTED BY THE BERLIN HOUSE OF REPRESENTATIVES BY A PROCEDURE OF ITS CHOOSING AND WOULD NOT RPT NOT BE ELECTED BY POPULAR ELECTION;

C. THEREFORE, THE ONLY PART OF THE SCRUTINY PROCEDURE THAT SHOULD CONCERN US IN OUR EXAMINATION IS THAT PART DEALING WITH POSSIBLE LOSS OF OFFICE OF A REPRESENTATIVE FROM BERLIN FOR CAUSES ARISING AFTER HE HAS BEEN SELECTED BY THE BERLIN HOUSE OF REPRESENTATIVES;

D. THE CRITERIA PROVIDED FOR SUCH LOSS BY THE EUROPAAHLGESETZ (AND BY REFERENCE BY THE FRG WAHLPRUEFUNGSGESETZ) ARE ESSENTIALLY OBJECTIVE CRITERIA AND ALTHOUGH THE EUROPAAHLGESETZ SPEAKS OF "DECISIONS" BY THE COMPETENT FEDERAL SCRUTINY ORGANS, ALL THREE LEGAL ADVISERS CONSIDERED THAT SUCH "DECISIONS" OF THE BUNDESTAG WOULD IN 99.99 PERCENT OF THE CASES AMOUNT TO NO MORE THAN FINDINGS OF FACT;

E. THUS, IN VIRTUALLY ALL INSTANCES  
SUCH SCRUTINY BY FEDERAL ORGANS WOULD NOT INVOLVE AN  
EXERCISE OF STATE AUTHORITY BY FEDERAL ORGANS OVER  
BERLIN REPRESENTATIVES, RATHER IT WOULD INVOLVE IMPLE-  
MENTATION OF A LAW IN FORCE IN BERLIN. THE LAW WOULD  
HAVE CLEARLY PRE-ORDAINED WHAT THE BUNDESTAG WOULD HAVE  
TO "DECIDE".

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IO-13 ACDA-12 EB-08 TRSE-00 OMB-01 /100 W  
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F. ALL LEGAL ADVISERS ACKNOWLEDGED HOWEVER THAT IN  
THEORY A CONTENTIOUS CASE MIGHT ARISE IN WHICH THE  
BUNDESTAG WOULD HAVE TO REACH A DECISION THAT WAS MORE  
THAN A MERE RECOGNITION OF FACT. THE US AND FRENCH  
LEGAL ADVISERS THOUGHT THAT THE PROBABILITY OF SUCH  
CASE WAS EXCEEDINGLY LOW AND DID NOT JUSTIFY LONDON'S CONCERN.

4. US LEGAL ADVISER INDICATED THAT IN HIS VIEW REFTTEL  
DRAFT BK/O (WITH SOME EDITORIAL IMPROVEMENTS) WOULD BE  
SUFFICIENT. NONETHLESS, UNDERSTANDING FROM BRITISH  
LEGAL ADVISER THAT AT THIS POINT LONDON WAS FIRM IN ITS  
VIEW THAT A BROADER BK/O WAS NECESSARY, US LEGAL ADVISER  
WORKED OUT TEXT WITH BRITISH LEGAL ADVISER TO

INCORPORATE LONDON VIEWS. THAT TEXT, WHICH FOLLOWS, IS  
IN US LEGAL ADVISER'S OPINION ACCEPTABLE FROM ALLIED  
PERSPECTIVE; HOWEVER, WE ARE NOT CONVINCED THAT IT IS  
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NECESSARY:

"THE LAW SHALL TAKE EFFECT SUBJECT TO THE PROVISIONS  
OF BK/O(77)8. IN CONSEQUENCE, IF A DECISION HAS TO BE  
TAKEN PURSUANT TO ARTICLE 29(4) IT SHALL, EXCEPT INSOFAR  
AS IT IS TAKEN BY THE EUROPEAN PARLIAMENT, BE TAKEN IN  
ACCORDANCE WITH SUCH PROCEDURES AS THE BERLIN HOUSE OF REPRESENTATIVES MAY ADOPT. IN ADDITION, NONE OF THE PROVISIONS REGARDING THE COMPETENCE OF THE FEDERAL CONSTITUTIONAL COURT SHALL APPLY TO OR IN RELATION TO REPRESENTATIVES FROM BERLIN."

5. FRENCH LEGAL ADVISER WHO WAS PRESENT AND PARTICIPATED  
IN THESE DELIBERATIONS DID NOT FULLY AGREE WITH THE  
TEXT DEVELOPED BY BRITISH AND US LEGAL ADVISERS. IN  
PARTICULAR, HE QUESTIONED HOW THE BERLIN HOUSE OF  
REPRESENTATIVES WOULD HANDLE THE SCRUTINY REQUIREMENT  
REFLECTED IN THE US-BRITISH DRAFT. VIEW OF BRITISH  
AND US LEGAL ADVISERS WAS THAT THIS WOULD BE A  
GERMAN MATTER TO BE RESOLVED BY THE FRG AND BERLIN  
SENAT. THEY COULD DECIDE, FOR EXAMPLE, THAT THE  
SENAT WOULD DEVELOP AN ENTIRE SCRUTINY PROCEDURE OF ITS  
OWN FOR THESE REPRESENTATIVES; OR, THE FEDERAL  
SCRUTINY PROCEDURE COULD BE EMPLOYED IN ALL CASES AND  
WHEREEVER A DECISION IN A CONTENTIOUS CASE WAS REQUIRED  
IT COULD BE UNDERSTOOD THAT THAT DECISION WOULD HAVE  
TO BE TAKEN BY THE BERLIN HOUSE OF REPRESENTATIVES  
EVEN IF THAT CALLED FOR THE UNUSUAL PROCEDURE OF THE  
BUNDESTAG REFERRING THE MATTER TO THE SENAT. US AND  
BRITISH LEGAL ADVISERS DID NOT TRY TO MAKE LIGHT  
OF THIS TECHNICAL DIFFICULTY, BUT MERELY  
INDICATED TO THE FRENCH LEGAL ADVISER THAT IT WAS NOT  
WITHIN OUR COMPETENCE TO SUGGEST HOW THE GERMANS MIGHT  
DEAL WITH THE REQUIREMENT, AND THAT MATTER WOULD UNDOUBT-  
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EDLY BE SUBJECT TO DISCUSSION WITH SENAT ONCE WE IN-  
FORMALLY PRESENTED IT TEXT OF DRAFT BK/O FOR CONSULTATIONS.

6. COMMENT: IT WAS USBER'S UNDERSTANDING THAT THIS  
MATTER WOULD BE FURTHER DISCUSSED AT THE BERLIN MISSION  
LEVEL AND THEREAFTER WITH THE BERLIN SENAT, BEFORE

REFERENCE WAS MADE TO BONN OR OTHER ADDRESSEES. THIS IS REINFORCED BY UNDERSTANDING THAT THE FRENCH LEGAL ADVISER WILL BE SENDING FURTHER VIEWS AND AN ALTERNATIVE TEXT FOR US TO CONSIDER. HOWEVER, WE HAVE BEEN ADVISED THAT BOTH BRITISH AND FRENCH HAVE REPORTED MATTER TO BONN EMBASSIES AND ACCORDINGLY WE ARE SENDING THIS MESSAGE. WE SEE LITTLE UTILITY IN BONN GROUP ENGAGING IN PARALLEL DISCUSSIONS ON SUBJECT WHILE BERLIN MISSIONS ARE STILL UNAGREED AND SENAT HAS NOT YET GIVEN ITS REACTION TO REVISED ALLIED TEXT OF BK/O. MISSION WILL CONTINUE THEIR DELIBERATIONS. WE ASSUME SENAT WILL HAVE DIFFICULTIES WITH LONDON'S INSPIRED TEXT. PROCEDURE USBER WOULD LIKE TO SEE FOLLOWED IS TO PRESENT TEXT (OR TEXTS, IF FRENCH PROVIDE ALTERNATIVE ACCEPTABLE FOR DISCUSSION) TO SENAT AND ONLY THEN REPORT MATTER TO BONN WITH BERLIN MISSION RECOMMENDATIONS.

7. ACTION REQUESTED: BONN - PLEASE ADVISE OF STATUS OF THIS MATTER IN BONN GROUP, IN PARTICULAR WHETHER BONN GROUP IS HANDLING MATTER NOW OR AWAITING FURTHER HANDLING OF MATTER IN BERLIN BEFORE PROCEEDING. GEORGE

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## Message Attributes

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